84-4

No. _____

In THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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October, 1983

QUESTIONS PRESENTED

1. Whether or not the Sixth Circuit Court of Appeals, by two-to-one split decision (Kennedy and Keith for the majority, Wellford dissenting) has misinterpreted the *San Diego Gas & Electric Co.* v. *City of San Diego* case, 450 U.S. 621 (1981) by inferring a holding which is not contained within that decision, so that a purported temporary interference with an investor's profit expectation constitutes an unconstitutional "temporary" taking under the Fifth Amendment of the United States Constitution such that money damages should be allowed. The majority's opinion is apparently based upon an implication contained in the *San Diego Gas* case as a result of a one-line remark contained in that opinion by Justice Rehnquist.

2. Whether, as here, a regional planning commission, which has been found to have acted in good faith, granting to a developer due process, both substantive and procedural, in the enforcement of validly enacted zoning ordinances and subdivision regulations, can be found to have violated a developer's Fifth Amendment rights by a temporary interference with profit-backed expectations, especially where such rights were supposedly obtained by submitting a preliminary plat for preliminary approval, which on the face of the plat itself indicates the approval is limited in scope as to the total number of dwelling units approved preliminarily on that plat, and which plat violates both the *original* zoning ordinances and subdivision regulations in effect at the time the development of the subdivision began and the later amended zoning ordinances and subdivision regulations against which the Bank is complaining.

3. Whether a lower court's ruling on a judgment notwithstanding the verdict should be overturned by a Court of Appeals when it is obvious that the majority in the split opinion has ignored facts upon which the lower court relied and has erroneously interpreted the facts as clearly contained in the transcript and appendix presented to that court.

OTHER PARTIES NOT LISTED IN THE CAPTION

WILLBURN H. KELLEY, JR., County Judge

MITCHEL BEARD, Planning Commission Member

ROBERT MEDAUGH, Planning Commission Member

JACK MEAGHER, Planning Commission Member

JOE BAUGH, Planning Commission Member

CAROLYN WATERS, Planning Commission Member

KENNETH MCNEIL, Planning Commission Member

CHARLES MOSLEY, Planning Commission Member

MORTON STEIN, County Planner

THAYER MARTIN, County Engineer

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to the extent that there may be no more control for orderly growth, or protection of the property rights of the citizens who have relied upon valid zoning ordinances and subdivision regulations and their vigorous enforcement..... 9

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HAMILTON BANK OF JOHNSON CITY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Williamson County Regional Planning Commission, et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. However, it is reprinted in the Appendix hereto at pp. 3a-22a. The order and memorandum of the district court granting the judgment notwithstanding the verdict is not reported. However, it is reprinted in the Appendix hereto at pp. 23a-28a.

JURISDICTION

The opinion of the Court of Appeals was rendered on March 7, 1984. Thereafter, a timely petition for panel rehearing and suggestion for rehearing en banc was denied on April 20, 1984. (App. 1a). By order dated May 3, 1984, the court below stayed its mandate until July 2, 1984. This petition for certiorari was filed within 90 days of entry of the order denying the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;. nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§ 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit which overturned the District Court's granting of a Judgment Notwithstanding the Verdict (App. 3a-22a). To facilitate an understanding of the important issues implicated in this case, before reciting the underlying facts material to consideration of the questions presented, Petitioners will briefly overview the historical development and background of the northern portion of Williamson County, Tennessee, which is sought to be developed as a part of this case and the enactment of the zoning ordinances which would allow for the special use sought to be approved by the Respondent and its predecessors in this case.

A. Historical Overview

Beginning in the early 1960's, when Metropolitan, Nashville, Davidson County, Tennessee began growing and increasing in population, one of the most popular areas for suburban growth was in the northern portion of Williamson County, which abuts the southern boundaries of Nashville, Davidson County. From a geographical standpoint, portions of northern Williamson County contained beautiful rolling farmland, and fairly steep hills of various types of soil composition. Once the prime land for subdivision development, which consisted of one acre plus lots and ranch style homes, covered most of the large tracts available in northern Williamson County, developers sought ways to develop other areas which contained some level-to-gently rolling land and steep hillsides which had been thought to be non-developable.

As the result of that growth, certain developers began, in 1972, to propose to the Williamson County Court, now the Williamson County Commission (the legislative body of that county) that a change be made in the zoning ordinances to allow for a development which is commonly known as "planned unit development" or "cluster housing". This type of development, which had been successful in other parts of the country, would allow the inclusion of certain land not necessarily devel-

opable for residential housing to meet the density requirements of the zoning ordinances by clustering the living units closely together and maintaining the other property for open space for the use and benefit of the residents of the developments.

As a result of the efforts of several developers seeking to get approval for such cluster homes or planned unit developments, an ordinance was enacted by the Williamson County Commission to amend its zoning ordinances to allow for such developments. Since that enactment, there have been several cluster or planned unit developments approved in Williamson County, most of which have been successfully completed.

The new zoning ordinance was enacted by the Williamson County Commission in 1972. At that time, an individual or developer seeking approval of a development was required to come before the Williamson County Regional Planning Commission for the preliminary approval of what was called an "initial sketch plan". The initial sketch plan, as the title connotes, was a very limited plan in regards to any engineering data that might ultimately relate to ability to get approval of either a final plat or a building permit for an individual building lot. The purpose of the initial sketch plan was to allow the Planning Commission, the county planner, and the developer to review the proposed development to determine whether or not it *generally* appeared to be in conformance with the zoning ordinances and subdivision regulations.

It should be noted that the subdivision regulations, as opposed to the zoning ordinances, were adopted by the Planning Commission, whereas the zoning ordinances were adopted by the Williamson County Court or the County Commission. Under the scheme of things, the Planning Commission could grant certain variances to the subdivision regulations, but had no authority or power to grant any variances to the zoning ordinances.

Once a developer received preliminary approval of the sketch plan, he could then proceed to have the engineering data com-

pleted showing all necessary details as to roadgrade, utility installation and the like and present it to the Planning Commission for final plat approval. Once final plat approval had been obtained and the developer had either (a) posted a bond equal to the cost of the necessary improvements for utilities and roadways to complete that portion sought to be finally platted, or (b) had actually installed the improvements, then he could obtain final plat approval to be recorded in the county register's office. It was only then that a developer was allowed to sell building sites.

The zoning ordinances and subdivision regulations for Williamson County were changed from time to time. The zoning ordinances were changed by the Williamson County Commission in 1979. The change impacted somewhat on the development of the project which is the subject of this action. The subdivision regulations which were controlled by the Planning Commission were also changed from time to time, which also impacted somewhat on the development. The underlying problems with the development which constituted a part of the Planning Commission's ultimate denial of approval of a newly submitted plat in part were effected by those changes, but *primarily* were based on the zoning ordinances and subdivision regulations originally in effect at the time the first initial sketch was preliminary approved.

Other factors, uncontrolled by and unrelated to the Planning Commission, seriously affected the progress of the development. They included: 1) a condemnation of approximately 18 1/2 acres by the State of Tennessee of the originally proposed development for inclusion in the Natchez Trace Parkway, for which the developer was compensated; 2) sale of the golf course property which had previously been dedicated to the county under an open space easement to be held primarily for the benefit of the residents of the development, and 3) the insolvency of the original developer which terminated in the foreclosure upon him by the respondent Hamilton Bank of Johnson City in the fall of 1980.

B. The Underlying Controversy

The original developer of the property in question sought and obtained initial sketch plan approval from the Planning Commission on February 1, 1973 for a development to be known as the Temple Hills Country Club Estates. The original total project as represented on that preliminary sketch plan indicated that there were 676 acres in the proposed development. Of that 676 acres, 287 acres were designated for dwelling unit lots, while 129 acres were designated for *future* development. In addition, the initial preliminary sketch plan showed actual dwelling units presented in *this* sketch plan as 469, and as allowable dwelling units for future development, 267 units. In addition to those figures, the initial sketch plan upon which the respondent now claims certain vested rights, contained certain areas designated for future development. These areas as shown on the initial sketch plan contained a note that read:

> "THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION."

Also, the notes to the plan, and particularly Note No. 9 thereto, provides:

> "PARCELS WITH NOTE 'THIS PARCEL NOT TO BE DEVELOPED BY THE PLANNING COMMISSION' NOT A PART OF THIS PLAT AND NOT INCLUDED IN GROSS AREAS."

This plat with these notes was revised and reapproved in May 1973 and June 1974. No further action was taken on the total plan, although certain sections did receive final approval in 1974 and 1975, until the initial sketch plan was reapproved preliminarily in June 1975. There was no further reapproval of the preliminary plan until April 1978, and again until April 1979. At no time during that reapproval process of the preliminary plan were the notes as referred to above ever deleted or changed, and no approval was sought for the development of the areas marked for future development.

It was not until June 1981 that the respondent, Hamilton

Bank of Johnson City, sought approval of a preliminary plat from the Planning Commission. This was after the Bank had been forced to foreclose on the prior developer, and did in fact bid the remaining undeveloped property in at foreclosure sale in November 1980.

It was in June 1981, for the first time, that a *new* plat was presented to the Planning Commission by the Bank which showed proposed development in those areas previously noted:

> "NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION."

It is as a result of these new proposed developments, in areas previously reserved, that the controversy arises. In addition, the controversy arises because additional engineering data, which was not previously presented to the Planning Commission, showed roadgrades in certain areas to be far in excess of those permitted under the previously enacted subdivision regulations. The engineering data showed slopes on portions of the land that were impermissible for building sites. Such land was required to be included in the open space under the original zoning ordinance. While the proposed plat was turned down for eight reasons, some of which may or may not have been reasons growing out of the ordinances and regulations existing in 1973 when the first initial sketch was approved, most of those reasons were based on the original regulations and ordinances. The approval process involving the initial sketch plan, lacked the engineering data mentioned above. Such matters would only have been brought before the Commission at such time as final plat approval was sought. This had never been done.

The Bank now takes the position that simply because the original preliminary sketch showed 676 acres, it is entitled to develop 736 units. This total is based strictly upon a mathematical calculation on the density formula provided in the original zoning ordinance. This calculation does not take into consideration the portion of the property required by the ordinance to be deducted from the gross area, nor the fact that a portion of the property no longer belongs to the development, i.e., that por-

tion having been condemned by the State. The Bank also totally ignores the fact that the original sketch plan clearly states on the face of it that certain parcels were not to be developed until subsequent approval was obtained from the Planning Commission, as well as the fact that the actual number of dwelling units approved on that plat was only 469.

The Bank has, since the initial turndown of its preliminary plat in 1981, made no genuine attempt whatsoever to correct the deficiencies pointed out to it. The Bank proceeded, it is suggested, with all deliberance to keep the plat in such a form that it would not be approved by the Planning Commission. The Bank, in fact, spent most of its time, energy and resources hiring engineers to testify at trial that, because of the eight reasons given by the Planning Commission for turning it down, it was now economically impossible to develop the plat. It never attempted to present any proposal to the Planning Commission of any viable alternative which could meet any of the zoning ordinances and subdivision regulations enacted in 1973, by which this Respondent must comply. It is submitted that the Bank realized that it had foreclosed upon a piece of property, or in fact had made loans upon a piece of property, that was not developable under any set or circumstances, under any ordinances or subdivision regulations. The Bank simply sought to create a scenario by which it could claim damages and recover such damages from the people of Williamson County by alleging and arguing that the ammended zoning ordinances and subdivision regulations, not the original ordinances and regulations in effect when the subdivision was begun in 1973, were the factors preventing approval of the plat it submitted in 1981. In August 1981, the Bank proceeded to file suit against the Williamson County Regional Planning Commission, its members, the county planner, the county engineer and the county executive for its supposed damages as a result of the Planning Commission's action. It was only after the trial, and in an attempt to settle the question as to the estoppel issue, that the Bank made any attempt to redesign its proposed plan. When the plan was redesigned, the Planning Commission did, on March 10, 1983, grant a preliminary approval of a new plat.

C. The Judicial Procedure Below

The Bank filed a petition in 1981 in the United States District Court for the Middle District of Tennessee pursuant to Title 42 U.S.C. §§ 1983, 1985, and 1988, seeking relief and damages as a result of the Planning Commission's refusal to approve its new preliminary plat. After three weeks of testimony and hundreds of exhibits being introduced into evidence, the jury retired and was given certain form interrogatories to be completed, over the objection of the defendants as to the form and content. These were returned to the Court on April 20, 1982. The defendants timely filed a motion for Judgment Notwithstanding the Verdict which was granted by the District Court Judge on June 4, 1982 (App. 23a-28a). In addition to the final Order of the Court granting the Judgment Notwithstanding the Verdict, an injunction was issued by the Court pursuant to the Court's finding as to the equitable estoppel issue. (App. 29a-30a). Appeal was then had by the Respondent Hamilton Bank to the Court of Appeals for the Sixth Circuit, as well as by the Planning Commission as to the injunctive relief. The appeal as to the injunctive relief, having since been voluntarily dismissed by agreement between the Bank and the Planning Commission, resulted in the approval of a preliminary plat that would allow for the continuation of the development of the remaining property at Temple Hills.

REASONS FOR GRANTING THE WRIT

A. The contrary decision of the Court of Appeals below conflicts with the prior rulings of this Court and numerous other Courts of Appeals, so that it is now unclear as to the rights of developers regarding the function of regional planning commissions across the country. This uncertainty in the law has the potential of subjecting regional planning commissions to billions of dollars in damages heretofore not thought to be available to developers as a result of the legitimate exercise of authority by such planning commissions. To allow the decision of the Court of Appeals for the Sixth Circuit to stand in this case will have such an absolute chilling effect upon plan-

ning, as to make orderly and necessary planning of communities totally chaotic to the extent that there may be no more control for orderly growth, or protection of the property rights of the citizens who have relied upon valid zoning ordinances and subdivision regulations and their vigorous enforcement.

B. That the issue of damages appropriate in a Fifth Amendment temporary taking has never been ruled upon by this Court, although in several prior decisions this Court has earnestly expressed a desire to resolve the question.

The reasons presented for granting this writ of certiorari, denoted as A. and B., are so closely related that they will be discussed together to avoid unnecessary repetition.

The questions presented by this writ are of such exceptional importance, transcending the particular factual situation and the parties below, that the entire planning scheme of every local governing authority across this country will be severely impacted as a result of the split holding, of the Sixth Circuit Court of Appeals. This is especially true considering the factual basis upon which the Court of Appeals basically turns the dissent of the *San Diego Gas* case[1] into the controlling law, at least for the Sixth Circuit. It is without question that this decision will impact upon all of the other circuits even though there are conflicts in those circuits. To allow the dissent in the *San Diego Gas* case to become law and to be interpreted to mean that a developer is entitled to monetary damages for any temporary interference by a planning commission, will effectively eliminate any control over any development from that date forward. Given the facts presented in this case, no planning commission member, anywhere, would risk the attendant liability to enforce any subjective interpretation of any subdivision regulations, zoning ordinances or building codes against any developer. This is not to say that in a proper case that monetary damages may not be appropriate. It is to say that in the case

[1] *San Diego Gas & Electric Co.*, v. *City of San Diego*, 450 U.S. 621 (1981).

based upon these factual circumstances, to allow this decision to stand would ultimately destroy any orderly planning and control of property development in these United States.

As both the majority and dissenting opinions in this case and numerous other decisions by other circuits have indicated, the Supreme Court has not yet set a clear standard as to what conduct amounts to a taking under the Fifth Amendment to the Constitution. Further, the Supreme Court has not yet determined what the appropriate remedy for a taking would be, especially where the taking is "temporary in nature". Because of what is believed to be well meant dicta in *San Diego Gas*, both by the majority and the dissenting opinion, planning commissions across this country, as well as developers, find themselves dealing in a twilight zone. It is submitted that no justice had previously caused so much uncertainty as to the law concerning this issue until Justice Rehnquist said, "I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." Exactly what Justice Rehnquist meant by that statement and how Justice Rehnquist would now rule on the issue, if it be presented to the Court by virtue of this writ of certiorari, can only be determined if the Court grants this writ. The Petitioners assert that Judge Wellford in his well-reasoned dissenting opinion clearly shows that Justice Rehnquist would decide the case contra to the majority opinion as a result of the opinion issued in the case of *Loretto* v. *Teleprompter of Manhattan, CATV Corp.*, 102 S.Ct. 3164 (1982).

This issue must now be decided by the Supreme Court. The groundwork has been previously laid by the prior decisions of this Court in *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978), *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric* v. *City of San Diego*, 450 U.S. 621 (1981), *Loretto* v. *Teleprompter of Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982). From this line of cases, various circuits have found various implications and interpretations. The result is contrary decisions among the various circuits.

In a recent case from the First Circuit Court of Appeals, *Cita-*

del Corp. v. *Puerto Rico Highway Au*thority, 695 F.2d 31 (1st Cir. 1982), the court dealt with the problem left by the *San Diego Gas* case and held that federal courts may enjoin such unconstitutional conduct on the part of states in an inverse condemnation proceeding, but they may *not* award damages. In a footnote[2] in that decision, the court precisely points out the problem left by *San Diego Gas*, which has arisen once again in this case.

The Seventh Circuit contra to the First Circuit in *Barbian* v. *Panagis*, 694 F.2d 476, 482 n. 5 (7th Cir. 1982), interprets the Rehnquist statement as being a concurring opinion that calls upon the "entire community" to share in compensation for a property owner's loss. In that case, at Footnote 5, the Court of Appeals for the Seventh Circuit says:

> "Thus, on the Taking Clause question, the dissent in *San Diego Gas* reflects the view of a majority of the Court. See *Devines* v. *Maier*, 665 F.2d 138, 142 (7th Cir. 1981).

[2]*Id.* at 33 n. 4. Since our decision in *Pamel*, the Supreme Court has decided *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1981). It appears that at least eight of the justices may disagree with our unwillingness to characterize oppressive regulation as a taking, see 450 U.S. at 628 n. 8; *id.* at 651-53 (Brennan, J., dissenting, but only four would find that such a taking requires compensation, *see Id.* at 653-58 (Brennan, J., dissenting). It may be that Justice Rehnquist's concurrence should be taken as a fifth vote in favor of compensation, *see Id.* at 633-34 (Rehnquist J., concurring), but deriving enough direction from his brief comment in support of "much of what is said" by Justice Brennan to abandon our position that the constitution does not require compensation in this case seems to be carrying judicial tea leaf reading to an uncalled-for extreme. In any event, none of the justices addressed the issue of federal court ordered compensation, since the lower court in *San Diego Gas* was a state court. Even if the constitution is read to require compensation in an inverse condemnation case, the Eleventh Amendment should prevent a federal court from awarding it. See *Quern* v. *Jordan*, 440 U.S. 332 (1979); *Edelman* v. *Jordon*, 415 U.S. 651 (1974); *Knight* v. *State of New York*, 443 F.2d 415 (2d Cir. 1971); *Beck* v. *State of California*, 479 F.Supp. 392 (C.D. Cal. 1979); *Nasralah* v. *Barcelo*, 465 F.Supp. 1273 (D.P.R. 1979).

The Fifth Circuit in *Frazier* v. *Lowndes County, Miss., Board of Education*, 710 F2d 1097 (5th Cir. 1983) decision, is a case which, if the court had followed the dissent in *San Diego Gas* as interpreted by the Sixth and Seventh Circuits, would have reached a contra decision and granted damages for a temporary taking, but it did not do so. In that case, in a situation where the taking issue was presented to the court, the court relied upon the cases which the Supreme Court had decided by majority opinion, i.e., *Agins* v. *City of Tiburon*, 447 U.S. 255, and *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, and held that the proper remedy is one of estoppel.

The inconsistencies now existing in the circuits are sufficient to require this writ of certiorari be granted in order to resolve this conflict.

C. That the majority of the Court of Appeals erroneously interpreted the evidence presented to it and erroneously interpreted the "implicit" holding of the *San Diego Gas* case.

The United States Supreme Court has never *explicitly* held that the regulations which *permanently* deprive an owner of all reasonable beneficial use of his property constitutes a "taking" of that property and, *a fortiori*, has never held that regulations which *temporarily* deprive an owner of *some* reasonable beneficial use of his property constitutes a "taking" of the property. The courts have found, however, that where restrictions do constitute a "taking" of property because it precluded a reasonable use, the remedy has been to invalidate the regulations that place such restrictions upon the property. This is not to say that there has been any deprivation of the Bank's rights in this case.

The decision in *Agins* v. *City of Tiburon*, 447 U.S. 255, (1980), is very close in point to the factual situation concerned in the present case. In the *Agins* case, there had not been submitted a plan for development of the property. It is submitted that the same exact situation exists in this case, for the Bank has not presented a plan for development that is in compliance with either the zoning ordinances and subdivi-

sion regulations in effect in 1973 nor with those in effect in 1980-81. In the *Agins* case the court refers in Footnote 9 to the issue presented as follows:

> . . . Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth* v. *United States*, 308 U.S. 271, 285 (1939).

Id. at 263 n. 9.

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), although the court found that the regulation involved did amount to a "taking", the remedy was to invalidate the regulation rather than award compensatory damages or mandate formal condemnation of the property.

It is suggested that there is no authority whatsoever to find a "taking" where, as in this case, the property owner cannot establish its rights under earlier ordinances and regulations. If the property cannot now be developed under either the set of regulations in effect in 1973 when the subdivision was begun, or in 1981 when the plat under controversy here was submitted, then there cannot be a "taking" of any type. It is the topography of the land that is left for development after the condemnation of 18.5 acres that prevents its development from yielding as large a number of buildable units as the Bank desires.

In this case, both the district court and the jury found that the bank received all prerequisite due process, both substantive and procedural; further, the district court found that the zoning ordinances and subdivision regulations as applied by the Planning Commission to the plat submitted by the Bank were "rationally applied". Before there can be a "taking", there must be

some right or thing in existence, to which a person is entitled to protection, which is diminimized or removed from that person or entity. Without some prior approval of a plat for that portion of the property, the Bank acquired no rights which could be violated. *Goldblatt* v. *Town of Hempstead, New York*, 369 U.S. 590 (1962); *Village of Euclid, Ohio* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); and *Gorieb* v. *Fox*, 274 U.S. 603 (1927).

The majority opinion of the court below also states that there was no remaining economically viable use of the Bank's property, and based that finding solely on the testimony of the Bank's expert, Mr. Hunt, whose testimony was based upon the interpretations given to him by the Bank's employee, Mr. Ragsdale. The majority finds, "[a]s there was no convincing evidence offered to contradict this expert opinion, the evidence supports a finding that the property had no remaining economically viable use" (Pg. 8 of the opinion) (App. 10a). The majority totally ignores the testimony of other qualified experts. Mr. Mort Stein, the county planner, and Mr. Thayer Martin, the county engineer, testified that the property could be developed so that approximate', 558 building units could be located thereon and still satisfy the Planning Commission's eight objections to the plat that the Bank submitted in June 1981.

The majority below even concedes that if there could be 336 additional units built on the property, then the development would retain economically viable use. (See Footnote 5, page 8, of the majority's opinion). Judge Wellford, in his dissent, after apparently fully examining the record, finds, "Examination of the record before us, however, indicates that it was virtually conceded that even applying 1979 standards, a total of 548 would be approved on the property." The figure of 548, less the 212 already platted and approved, equal 336 additional building sites. As the majority concedes, this number would constitute a viable economic use.

As Judge Wellford points out, "the cases cited by the majority do not, in my view, support the result which they reach." (dissenting opinion, Pg. 19), and in particular, he cites the perti-

nent holding of *Hernandez* v. *City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *aff'd after remand*, 699 F.2d 734 (1983), in support of his position.

CONCLUSION

Planning commissions, or their counterparts in local governments across this country, as well as developers, now face a dilemma in making even the most miniscule decision regarding any proposed real estate development. Because of the various interpretations of the *San Diego Gas* case, which have lead to various circuits having their own interpretation of what constitutes a taking under the Fifth Amendment of the Constitution, as well as what constitutes an appropriate remedy therefor, this issue must be resolved by this Court. The contrary decision below, taken in light of other conflicting decisions by other circuits, injects such confusion and uncertainty into this important area of this nation's economic growth that this Writ of Certiorari must be granted to settle this reccuring and important question of constitutional law.

The majority opinion below has only compounded this problem by erroneously analyzing the facts and interpretation of the law and application of that law to the facts. A Writ of Certiorari should issue to correct the judgment below and to set a uniform standard for all the circuits to determine under the Fifth Amendment of the United States Constitution when, where and under what circumstances an unconstitutional *permanent* and/or *temporary* "taking" of property without just compensation occurs.

It is further submitted that this is a proper case for this Court to summarily reverse the decision of the court below and reinstate the final decision of the District Court in its granting of the Judgment Notwithstanding the Verdict.

Respectfully submitted,

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